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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 745

WILLIAM J. FITZPATRICK, *Petitioner*

v.

PHILIP W. SNYDER, Commander,
Boston Naval Shipyard, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

CLAUDE L. DAWSON
Attorney for the Petitioner,
1012 - 14th St., N.W.
Washington 5, D. C.

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In The

Supreme Court of the United States

October Term, 1954

No. .....

William J. Fitzpatrick, *Petitioner,*

v.

Philip W. Snyder, Commander,
Boston Naval Shipyard, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, William J. Fitzpatrick, appellant below, prays for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on March 22, 1955 (R.90).

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts is reported in 124 Fed. Supp. 96. The opinion of the United States Court of Appeals for the First Circuit has not yet been reported, the opinion is set forth on pages 81 to 89 of the record.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was rendered on March 22, 1955 (R.90). This petition for certiorari is filed within ninety days thereafter pursuant to the provisions of Title 28 U.S.C. Section 2101 (c), and also within the time allowed by the said Court of Appeals (R.91) in which the mandate will be stayed.

QUESTIONS INVOLVED ON APPEAL

Whether a Veteran Preference Eligible in Governmental Employment Whose Rights of Retention in the Event of a Reduction in Force Have Been Destroyed by an Invalid Regulation of the United States Civil Service Commission Is Required to Appeal to the United States Civil Service Commission Before He Is Entitled to Judicial Relief.

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix A infra, pp. 17-18-19.

STATEMENT OF THE FACTS

The petitioner was a machinist outside employed in the Boston Naval Shipyard. He was an honorably discharged sailor of the United States and served during

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peace and war time from December 10, 1928 through November, 1949. (R. 3) The petitioner having qualified in accordance with the rules and regulations of the United States Civil Service Commission entered the employment of the United States at the Boston Naval Shipyard on November 13, 1951, and satisfactorily completed his trial or probationary period. He received what is known as an indefinite appointment because of the so-called Whitten rider which will be hereinafter referred to. On June 21, 1954 (R.4) he received notice that due to a reduction in force in the Boston Naval Shipyard he would be separated from his governmental position on July 23, 1954.

On July 20, 1954, and just prior to the petitioner's proposed separation from governmental service he filed a complaint in the United States District Court for the District of Massachusetts, praying that a preliminary injunction issue to restrain the respondents from carrying into effect the petitioner's discharge from his governmental employment. (R.1-5) The preliminary injunction was issued on July 23, 1954. (R.13) The United States District Court held a final hearing on the complaint on September 17, 1954, and rendered an opinion which is set forth on pages 13 to 24 of the record. Judgment of the United States District Court was entered on September 17, 1954 in favor of the defendants, respondents herein, but in order to give the petitioner the right of appeal to the United States Court of Appeals for the First Circuit, the injunction was continued until November 1, 1954 (R.25), and in the United States Court of Appeals for the First Circuit the injunction has been continued until the mandate is due to be issued on April 26, 1955 (R.91).

The question involved principally in this case is the validity of a regulation of the United States Civil Service Commission giving nonveterans holding the same type of

an appointment as this petitioner a preferential right of retention in grade over and above the rights of the petitioner to be retained in his employment. The record discloses that there are at least 100 employees in the Boston Naval Shipyard who have the same type of an appointment as this petitioner that is to say an indefinite appointment, and who are not honorably discharged soldiers, sailors and marines of the United States. These employees are placed in a preferred class above the petitioner because of prior service, most of which was during the war period from year 1941 to 1945 when they then left to seek employment in private corporations, and returned again to the governmental employment apparently when private industry had no job positions for them. During the War period they acquired a permanent status, although after they left the governmental service and again returned to the government for employment, they received the identical type of appointment as this petitioner but they were placed in a higher retention group because of their service during the war periods.

The petitioner challenged the regulation of the Civil Service Commission placing the nonveterans in a higher retention group than the petitioner although he and the 100 nonveterans so employed held the same type of appointment or tenure of office.

From the judgment of the United States District Court the petitioner appealed and raised all questions of law relative to the validity of the regulation in question. The United States Court of Appeals for the First Circuit totally ignored the question of the validity of the regulation in question but decided the appeal based solely upon the proposition that the petitioner had not fully exhausted any administrative appeal that he might have before the United States Civil Service Commission.

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(R.83) This right of appeal was given to the petitioner under the provisions of Section 14 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 863). The decision of the said Court of Appeals conflicts with decisions of this Court which is the basis of this application for a writ of certiorari. The Court of Appeals held that the petitioner should have exhausted his administrative remedies.

SPECIFICATIONS OF ERROR TO BE URGED

The petitioner will urge in this case that the decision of the U. S. Court of Appeals rendered conflicts with decisions of this Court holding that under the state of facts and circumstances of this case it is not necessary to exhaust administrative remedies. It will also be urged that the regulation placing nonveterans in a higher retention group than the petitioner when each were holding the same type of appointment and tenure of office conflicts with the interpretation of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851) by this Court, and that therefore the regulation in question is wholly void and of no legal effect in depriving the petitioner of his preferential right of employment in governmental service.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted under Subdivision (b) of Part V of Rule 19 of this Court in that the United States Court of Appeals for the First Circuit has rendered an important question of federal law in conflict with the applicable decisions of this Court, and has sanctioned such a departure by the lower Court as to call for the exercise of this Court's power of supervision.

At the very outset the attention of the Court is directed to the fact that if the petitioner was required to exhaust any administrative remedies that he may or might have in the matter, the United States District Court for the District of Massachusetts would be divested of jurisdiction in the petitioner's case. While the United States District Court in question has the jurisdiction to issue a preliminary injuction to restrain an act which has not yet taken place, it has no jurisdiction to issue a mandatory injunction to restore the petitioner retroactively to the position and grade from which he would have been discharged if he had to exhaust his administrative remedies. This is one of the jurisdictional defects in the United States District Courts outside of the District of Columbia that should receive the attention of Congress for amendment. This results in all of the cases similar to the petitioner where preliminary injunctions cannot be obtained to be filed in the District of Columbia, and thus overburden that Court when the cases should be brought in the jurisdiction where the plaintiffs and the witnesses reside.

The petitioner's plight is due to the so-called Whitten Amendment 64 Stat. 1066, (Section 1302 of the Act of September 27, 1950) which provided that thereafter all appointments made in the governmental service should be on an indefinite basis. This Act required that even in promotion cases the employee being promoted, although from a permanent status, would receive an indefinite appointment.

The Civil Service Commission which has not liked the Veterans Preference Act, and in fact has rendered a number of decisions in conflict with the terms and conditions of the Act, again saw an opportunity to destroy the effectiveness of the Act in its application to the veteran preference eligibles in governmental employment.

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After the Whitten Amendment they devised a scheme of classification of employees by placing permanent employees without veterans preference in a higher retention group than veteran preference eligibles with indefinite appointments. The petitioner has no quarrel with this group assignment but what is definitely complained is that the nonveterans who in many instances had acquired a permanent status while the country was at war, and veteran preference eligibles were in uniform, were given the same type of appointment and tenure of office as the veteran preference eligible with a preference in retention because of the prior service under which they had acquired a permanent status. It is the position of the petitioner that the right of retention in employment is predicated upon the type of the appointment or tenure of office as construed by this Court, and not on the fact of length of service. Unquestionably but for the Whitten Amendment the veteran preference eligible would have a preference over the nonveterans who were retained in the Boston Naval Shipyard when this petitioner received his notice of discharge from employment.

Attention of the Court is directed to the exhibits introduced at the trial (R.35-36-37). The employee John F. Gover was employed during the war period from February 20, 1942 through May 1, 1946, when he was discharged. He was reemployed on January 3, 1951 receiving an indefinite appointment which is the same type of employment appointment which this petitioner obtained. Also note the employment record of Antonio F. Ranieri (R.36). He was employed February 18, 1942 through July 29, 1946, the war period, and reemployed on March 23, 1951 and given an indefinite appointment, the same as this petitioner, but because of the employment during the war period a higher retention in employment than this petitioner. Both Gover and Ranieri were engaged in the identical job position as the petitioner.

The petitioner has set forth the facts above shown so that this Court will get a complete picture of the situation that existed when this petitioner received his notice of being discharged from his employment in the Boston Naval Shipyard.

The Regulation of the United States Civil Service Commission Giving a Preferential Right of Retention in the Event of a Reduction in Force to a Nonveteran Employee Over a Veteran Preference Eligible When Each Hold the Same Type of Appointment or Tenure of Office Was Clearly Null and Void.

In this connection two decisions of this Court are directly in point. First the case of *Hilton* v. *Sullivan*, 92 L.Ed. 1416, 334 U.S. 323. In that case, a nonveteran employed in the Charleston, South Carolina Naval Shipyard challenged the regulations issued by the Civil Service Commission in reference to reduction in force as referred to in Section 12 of the Veterans Preference Act (Title 5 USC 861). The nonveteran contended that the regulations promulgated should have given due effect to the length of service which the nonveterans had performed in determining whether or not they should be retained. In simple language, it was contended that because he and others had longer periods of service in the Charleston Naval Shipyard, that this fact should have been taken into consideration in promulgating the reduction in force regulations. This Court, after referring to the Committee Reports of Congress and the Hearings before the Committee, said: (p. 339)

> "Not only did the friends of the Veterans Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing

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the Civil Service Reform League said: "I think you ought to give consideration to . . . . . retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service." And another witness against the Bill pointed out that under it nonveterans would "be the first to be laid off and the last to be taken on."

The Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy."

The case of *Brannan* v. *Elder, et al*, 341 U.S. 227, 95 L.Ed. 939 is also applicable to the situation in this case. Elder and Furman were employed as attorneys for the Department of Agriculture. They received what was known as War Time appointments, that is to say, their appointments were for a period of the War only. Following the close of the War there was a reduction in force in the office of the Solicitor of the Agriculture Department. Nonveterans with permanent appointments were retained in employment and Elder and Furman who were both veterans were discharged from their employment. They contended that under Section 12 of the Veterans Preference Act (5 USC 861) and (5 USC 648) they should have been retained in employment, and the nonveterans discharged. This required an interpretation of Section 12, supra. This Court held that the permanent employees who were retained had a preference over Elder and Furman for the reason that the preference which was accorded to them under Section 12 for retention in service was based upon tenure of office, and

because of their War Time appointments the permanent employees were not competing employees within Section 12 of the Act. In plain language, this Court held that length of service did not give the permanent employees a preferential right of retention in employment, but their retention over the veterans was predicated upon the fact of their tenure in office. In other words, they, having obtained a permanent status, had a preference over veterans who did not have that status or tenure of office. This Court in this connection said at page 283:

> "This Court made a similar examination in Hilton v. Sullivan, 334 US 323, 92 L.Ed. 1416, 68 S.Ct. 1020 (1948). The decision in that case upheld the retention-preference regulations insofar as they granted veterans with classified status an absolute priority over nonveterans of the same status regardless of length of service. The Court stated that in the light of all pertinent history "no other interpretation of (Section 12) . . . can fairly be reached." Id. 334 US at 336. Since "length of service" and "tenure of employment" appear as parallel terms in the body of Section 12, it can be argued that if the proviso eliminates length of service as a barrier to veterans' preference, it also eliminates tenure. But this ignores a crucial difference in the historical treatment of these two factors. Executive Orders and Civil Service regulations prior to 1944 had consistently disregarded length of service in giving veterans preference over nonveterans with the same tenure—a fact stressed in the Hilton Case. Id. 334 US at 336, 337. On the other hand, the regulations had just as consistently distinguished "competing" groups on the basis of tenure, and had confined the scope of veterans' preference to employees of the same group. As early as 1932, the Commission provided that reduction in force was to be carried out in inverse order of tenure, permanent employees to be separated last. The rule was still in force at the time the Veterans Preference Act of 1944 was passed. 5 CFR (Supp 1943) Sec. 12.304.

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> Moreover, the legislative history of the Act is barren of any indication that this long-established separation of "competing" employees on the basis of tenure was to be broken down and subordinated to veterans' preference. * * * *."

It will thus be seen that the preferential right of veterans of retention in government service is predicated upon tenure alone, and that all employees holding the same type of appointment or tenure of office are competing employees.

The regulation issued by the Civil Service Commission gives effect to length of service rather than to tenure of office. It is therefore invalid under the ruling of this Court both in the cases of *Hilton* v. *Sullivan* and *Elder* v. *Brannan, supra,* for the reason that the Appellant had an indefinite appointment and a tenure of office identical with perhaps a hundred nonveteran employees in like position as the Appellant. The regulations of the Civil Service Commission giving the nonveterans a preferential right of employment over the Appellant is clearly invalid because it gives effect to length of service.

In this connection, but for the Whitten Amendment, the nonveterans who were retained in service and this Appellant would have both been permanent employees and there is no question but that the Appellant would have had to be retained in service if such a situation existed.

> *Reynolds et al* v. *Lovett et al*, 201 F.2d 181, 91 U.S. App. DC 276, *Cert. denied* 345 U.S. 926, 97 L.Ed. 1357.

There is one man who should know whether or not his amendment repealed the provisions of the Veterans Preference Acts and that man is the Honorable James L. Whitten, Congressman from the 2d District of Mississippi who was the sponsor of the amendment in question.

When the preliminary injunction was granted in this case there was some publicity in a Washington newspaper, The Evening Star, and Mr. Whitten took cognizance of this publicity and saw fit to address a letter to Claude L. Dawson, Esq., counsel for the plaintiff in this action in the District Court and there follows the communication from Congressman Whitten relative to this case. The Court will note that he makes a flat statement that there never was any intent in the Whitten rider to affect the Veterans Preference law in any way.

Jamie L. Whitten
2d Dist. Mississippi

Member:
Committee on
Appropriation

Office:
1215 House Office Building

Ranking Democrat
Subcommittee on
Agriculture
Appropriations

CONGRESS OF THE UNITED STATES.
HOUSE OF REPRESENTATIVES.

Washington, D. C.

July 27, 1954

Hon. Claude L. Dawson
Attorney at Law
917 15th St., N.W.
Washington, D. C.

Dear Mr. Dawson:

I note that yesterday's Washington Star carries a story in connection with a lawsuit in which you are representing a veteran.

May I say there was never any intent in the "Whitten Rider" to affect the Veterans' Preference Law in any way. I enclose a copy of the provision

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of law known as the "Whitten Rider," together with other material in which you may be interested.

With kind regards, I am

Sincerely yours,

Jamie L. Whitten, M.C.

Since the Regulation Giving a Preference to Non-veterans Was Predicated Upon Length of Service and Not on Tenure of Office, It Is an Invalid Regulation and It Was Not Therefore Necessary to Exhaust Any Administration Remedies.

The leading case in support of the heading above is the case of *Waite* v. *Macy*, 246 U.S. 606, 62 L.Ed. 892. In that case, a suit was brought by G. H. Macy and others to enjoin the Board of General Appraisers from applying an illegal test to imported tea. The District Court dismissed the case, 215 Fed. 456, but the decree was reversed and an injunction ordered by the Circuit Court of Appeals for the Second Circuit (140 C.C.A. 45, 224 Fed. 359), and from that decision the Board of General Appraisers appealed to this Court. The Board of General Appraisers was acting upon and pursuant to a regulation of the Secretary of Treasury who was given power to issue regulations covering the certain classes of tea. The Secretary of Treasury was not made a party to the suit. This Court held that the regulation was invalid and that the Secretary and the Board must keep within the statute and that the restriction by injunction should be enforced.

This case is particularly apropos to the situation in this case. Here, under this Court's interpretation of a proper regulation that could be promulgated under Section 12 of the Veterans Preference Act (5 USC 861), the Civil Service Commission has issued a regulation which is

based on length of service rather than on tenure. The Appellant and the nonveterans held the same type of appointment and tenure, and it is clear that the Appellant under this Court decisions had a preferential right of rentention in government employment because the nonveterans who were holding the same type of appointment as he had and were his competing employees.

The case of *Waite* v. *Macy, supra,* has never been overruled by this Court. It constitutes another exception to the general rule that administrative remedies do not have to be exhausted where there is a plain violation of the law or the public officials are adjudicating claims based upon an invalid regulation.

The rule on Limitations on Doctrine on the exhaustion of administrative remedies is discussed in 42 Am Jur at page 585, par. 200, and the following comment is made:

> "* * * Some cases suggest that where it plainly appears that the administrative remedy would be of no value and fruitless, the party seeking judicial relief does not have to complete administrative procedure before resorting to the courts, and this has so been held where the administrative authorities are powerless to afford relief in the face of a decision of the highest court of the state, or under the rules and regulations as promulgated by the head of the department, or under the provisions of the governing statute. * * "

Cited in support of this rule are the cases of:

Montgomery National Bank v. *Yellowstone County,* 276 U.S. 499, 72 L.Ed. 673
Waite v. *Macy, supra*
U. S. v. *Knox,* 128 U.S. 230, 32 L.Ed. 465
U. S. Alkali Export Association v. *U. S.,* 325 U.S. 196, 89 L.Ed. 1554

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See also the case of:

Order of Railway Conductors v. *Pitney,* 326 U.S. 561, 566, 90 L.Ed. 318

The following cases, it is believed, will support the Appellant's position in this case:

Knapp, et al v. *Hyde, Sec. of Agriculture,* 50 F.2d 272
W. A. Hover & Co. v. *Denver & R.G.W.R. Co.,* 17 F.2d 881
Clicquot Club v. *U. S.,* 13 F.2d 655
Mason v. *Sams,* 5 F.2d 255
Hunter v. *Atchison Topeka & S.F. R.R. Co.,* 171 F.2d 594, Cert. denied 337 U.S. 916, 93 L.Ed. 1726

In view of the foregoing authorities holding that where a regulation is invalid it is not necessary that the administrative remedies be exhausted.

The decision of the United States Court of Claims in the case of *John Cuiffo* v. *United States,* decided on March 1, 1955 clearly conflicts with the decision of the U. S. Court of Appeals for the First Circuit in this case. In the Cuiffo case, the plaintiff brought suit to recover for salary during a period of time when he claimed he was illegally discharged. The government defended upon the grounds that the plaintiff had not exhausted his administrative remedy of appeal under Section 14 of the Veterans' Preference Act of June 27, 1944 (5 U.S.C. 863).

In other words, the plaintiff in the Cuiffo case had the identical right of appeal to the Civil Service Commission as this petitioner had in his case. The Judges of the Court of Claims examined Section 14 of the Act and held that the provisions providing for an appeal were permissive only and not mandatory, and it was not necessary therefore that the plaintiff, John Cuiffo exhaust his

administrative right of appeal when the statutory right of appeal was not mandatory. This case has not yet been officially reported, but as stated above, it clearly conflicts with the decision of the Court of Appeals in the petitioner's case. In so ruling, the Court of Claims referred to the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U.S. 630, 634, which involved the necessity for a discharged man to pursue his administrative remedies under the Railway Labor Act. This Court held it was not necessary that such appeal be taken because the statute providing that an appeal could be taken to an Adjustment Board was not mandatory. This case likewise conflicts with the opinion of the Court of Appeals in the petitioner's case. See also *Levers* v. *Anderson*, 326 U.S. 219.

CONCLUSION

WHEREFORE, the petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Appeals for the First Circuit, and that upon such review, that the judgment of the said United States Court of Appeals for the First Circuit be vacated, reversed and set aside, and this cause remanded to the said Court with instructions to proceed further in accordance with the views of this Court.

CLAUDE L. DAWSON
Attorney for the Petitioner,
1012 - 14th St., N.W.
Washington 5, D. C.

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APPENDIX "A"

The Retention Preference Regulations which the Commission adopted subsequent to the Whitten Amendment are found as 5 CFR (1954 Supp.) 20.1 et seq. The critical portion of this regulation is section 20.4(c) which provides that:

"(c) Determination of tenure groups. For the purpose of determining relative retention preference in reductions in force, competing employes with performance ratings of "Satisfactory" or better shall be classified according to tenure of employment and veteran preference in groups and subgroups as follows:

"(1) Group I—Career. In the competitive service, this group consists of career employees who have completed probation and who are not "temporary" or "indefinite" as the result of promotion, transfer or reinstatement. . . . Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

"(2) Group II—Career-Conditional. In the competitive service, this group includes career employees who are . . . "temporary" or "indefinite" as the result of promotion, transfer or reinstatement, or are subject to some other limitations of a similar nature. . . . Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B".

"(3) Group III—Indefinite. This group includes persons serving under non-status non-temporary appointments in positions in the competitive service. . . . Within this group, persons entitled to veteran preference are in subgroup "A" and others in subgroup "B"."

"Sec. 863. Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in

the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirv days, furlough without pay or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision; Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative office and shall send copies of same to the Appellant or to his designated representative, and it shall be mandatory for such administrative office to take such corrective action as the Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title.

(June 27, 1944, ch. 287, Sec. 14, 58 Stat. 390, amended Aug. 4, 1947, c. 447, 61 Stat. 723)"
5 U. S. C. 863

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"Sec. 861. *Reduction in personnel; consideration affecting release.* In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service; Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions. (June 27, 1944, ch. 287, Sec. 12, 58 Stat. 390.)" 5 U.S.C. 861.

Proceedings in Court of Appeals

On October 25, 1954, the following Motion to Continue Injunction was filed:

MOTION TO CONTINUE INJUNCTION

The plaintiff moves that the injunction granted by the District Court in its decision dated September 17, 1954, which is to remain in effect until November 1, 1954, shall be continued until such time as this Honorable Court may determine the appeal from the decision of said District Court, as it appears at present that this Honorable Court

will not have an opportunity to act thereon, prior to November 1, 1954, the date of expiration of said injunction.

By his attorney,
/s/ SUMNER M. LIEBERMAN
SUMNER M. LIEBERMAN
11 Beacon Street

Thereafter on October 28, 1954, the following Order of Court was entered:

ORDER OF COURT
October 28, 1954.

It is ordered that the injunction of the United States District Court for the District of Massachusetts restraining the defendants-appellees herein until November 1, 1954, from discharging the plaintiff-appellant herein pursuant to the notice issued June 21, 1954 or any similar notice connected with the reduction of personnel at the Boston Naval Shipyard, be, and the same hereby is, continued pending appeal upon condition that said plaintiff-appellant execute a supersedeas bond in the sum of Four Thousand Dollars ($4000.00) in favor of the United States of America, employer, whereby said plaintiff-appellant shall be bound to pay to said United States of America an amount equal to all wages, salary or pay received by him from said United States of America as a result of such continued employment after November 1, 1954, if said appellant shall fail to make good his said appeal; such bond with surety, or cash, to be approved by this Court or a judge thereof.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Thereafter, on November 1, 1954, the following Order of Court was entered:

ORDER OF COURT
November 1, 1954.

Appellant herein having filed no supersedeas bond as provided in the order of this Court of October 28, 1954, as a condition precedent to the stay therein becoming effective,

Now, November 1, 1954, It is ordered that the conditional stay (or continuance of restraint) in said order of October 28, 1954, is without force and effect.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

On the same day, November 1, 1954, the following Motion to Reinstate Injunction or for Alternative Stipulation was filed:

MOTION TO REINSTATE INJUNCTION OR FOR ALTERNATIVE STIPULATION

The plaintiff moves that the injunction heretofore in effect be reinstated unless the defendants shall agree to place the plaintiff in a "Leave Without Pay" status pending determination of the appeal, that the plaintiff hereby represents to this Honorable Court his willingness to be placed in such status, so that in the event his appeal is decided in a manner adverse to him the government will suffer no loss.

By his attorney,
/s/ SUMNER M. LIEBERMAN
SUMNER M. LIEBERMAN
11 Beacon Street
Boston, Mass.
Attorney for plaintiff

On the same day, November 1, 1954, the following Order of Court was entered:

ORDER OF COURT
November 1, 1954.

Upon consideration of motion of plaintiff-appellant for a stay pending appeal, in which motion said plaintiff-appellant agrees to go upon a "Leave Without Pay" status during such pendency,

It is ordered that Philip W. Snyder, Commander, Boston Naval Shipyard, and Daniel Healy, Chief Civilian Assistant to the Industrial Relations Officer, defendants-appellees, and each of them, are hereby restrained until further order of this Court, from discharging plaintiff-appellant pursuant to the notice issued June 21, 1954, or any similar notice connected with the reduction of personnel at the Boston Naval Shipyard. If the United States of America, employer, should choose to put plaintiff-appellant on such "Leave Without Pay" status and said plaintiff-appellant should, contrary to the recital in the motion, refuse to accept such status, then the defendants-appellees may move in this Court for a vacation of this order.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

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Thereafter, on December 14, 1954, the following Motion to Strike Portion from Appellant's Record Appendix was filed:

MOTION TO STRIKE PORTION FROM APPELLANT'S RECORD APPENDIX

Now come the Appellees herein and move this Court to strike from the Record Appendix to Brief for the Appellant that portion which purports to set forth "a copy of Defendant's Exhibit D", which is found on page 42 thereof, on the ground that same is not a complete nor accurate copy of said Defendant's Exhibit D, and differs from the original in several material respects.

The Appellees further state that a photostatic copy of said Defendant's Exhibit D is attached hereto. In addition, a true copy thereof will be printed in Appellees' Record Appendix.

ANTHONY JULIAN
United States Attorney
/s/ JEROME MEDALIE
JEROME MEDALIE
Assistant U. S. Attorney
ATTORNEYS FOR DEFENDANTS, APPELLEES

[MEMORANDUM. Photostatic copy of Defendant's Exhibit D, attached to the foregoing motion, is here omitted as it appears at page 45 hereof. ROGER A. STINCHFIELD, *Clerk.*]

Thereafter, on December 17, 1954, the following Order of Court was entered:

ORDER OF COURT
December 17, 1954.

Upon motion of appellees, and after notice, It is ordered that the copy of Defendant's Exhibit D appearing at page 42 of the printed Record Appendix to Brief for the Appellant be stricken therefrom.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Thereafter, on January 4, 1955, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

Thereafter, on March 22, 1955, the following opinion of the Court and concuring opinion were filed:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 4899.

WILLIAM J. FITZPATRICK,
PLAINTIFF, APPELLANT,

v.

PHILIP W. SNYDER, COMMANDER,
BOSTON NAVAL SHIPYARD, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

[124 F. Supp. 96]

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Claude L. Dawson, with whom *Sumner M. Lieberman* was on brief, for appellant.

Jerome Medalie, Assistant U.S. Attorney, with whom *Anthony Julian,* United States Attorney, was on brief, for appellees.

OPINION OF THE COURT.
March 22, 1955.

WOODBURY, *Circuit Judge.* The plaintiff-appellant is an honorably discharged veteran of over twenty years service in the United States Navy. After his discharge from the Navy he qualified under the rules and regulations of the United States Civil Service Commission and in November 1951 he was given an "indefinite appointment" to the position of "helper machinist," from which he was later promoted to "journeyman machinist," in the Boston Naval Shipyard. His performance rating throughout his employment at the yard has been "satisfactory."

On June 21, 1954, he was served with notice that he would be separated from his employment on July 23 "because of reduction of force . . . due to a lack of work." At the same time, however, like notices were not served upon several non-veteran "journeymen machinists" at the yard with the same efficiency rating who also held indefinite appointments, but "indefinite appointments in lieu of

reinstatement," for the reason that they were career employees with "competitive status" acquired as a result of previous service as permanent employees prior to the date of their reinstatement, which, incidentally, antedated the plaintiff's employment.

A few days before the effective date of his notice of separation the plaintiff brought the instant suit grounded upon violation of his rights under § 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C. § 861 against the Commander of the Boston Naval Shipyard and his subordinate in charge of employment, the Chief Civilian Assistant to the Industrial Relations Officer. The relief requested is a preliminary injunction restraining the defendants from separating the plaintiff from his employment and, on final hearing, a declaratory judgment establishing the plaintiff's right to be retained in his position. The District Court held an immediate hearing on the application for temporary injunctive relief and on evidence introduced at that hearing found as a fact that over $3,000, exclusive of interest and costs, was in controversy. Taking the view that this was the only jurisdictional requirement in cases of this sort left open for its consideration by the decision of this court in *Wettre* v. *Hague*, 168 F.2d 825 (1948), it denied a motion filed by the defendants to dismiss for lack of equity jurisdiction on the ground of failure to exhaust administrative remedies and because the plaintiff had an adequate remedy at law and granted the temporary relief requested by the plaintiff.[1] On final hearing the court below reaffirmed its finding that the requisite jurisdictional amount was in controversy and also its conclusion that it was bound as to other jurisdictional matters by the decision in the *Wettre* case. Turning, there-

[1] This relief was continued from time to time until November 2 last when the plaintiff-appellant submitted a formal offer to go on "leave without pay" which was accepted by the Boston Naval Shipyard, effective immediately.

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fore, to the merits it found that the plaintiff was selected for separation in accordance with a Regulation of the Civil Service Commission binding on the Department of the Navy which, for the purpose of determining relative retention preference in the event of reduction of force, divided competing employees holding indefinite appointments whose performance ratings were "satisfactory" or better into three groups, veterans having preference in each group, and gave greater retention preference to a group consisting of employees who had civil service status based on previous periods of service as career employees than to a group consisting of those without such status. The court concluded with some hesitation that the Regulation was valid. Therefore, since the plaintiff clearly fell into a group with less retention preference than the group which included the non-veteran employees mentioned above, it entered the judgment dismissing the plaintiff's complaint from which he took this appeal.

We do not reach the question of the validity of the above Regulation of the Civil Service Commission because we think the District Court misunderstood the scope of the decision of this court in the *Wettre* case and for that reason erred in denying the defendants' motion to dismiss for lack of equity jurisdiction.

The *Wettre* case was one very similar to this as to parties wherein the plaintiffs alleged that they were veterans with ratings of "good" and that they were about to be demoted from supervisory positions at the Boston Naval Shipyard while non-veterans with greater seniority were not. This, they said, was in direct violation of their rights under the proviso of § 4 of the Act of August 23, 1912, 37 Stat. 413, which provided that "in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary."

Wherefore they demanded a temporary and permanent injunction against their demotion and an award of money damages. The defendants did not answer, but moved to dismiss for lack of jurisdiction on four grounds: failure to join the Secretary of the Navy; failure to join the members of the United States Civil Service Commission; because in essence the suit was against the United States and it had not consented to be sued; and because the plaintiff had not exhausted the administrative remedies given to them by § 14 of the Veterans' Preference Act of 1944. 58 Stat. 390, 5 U.S.C. § 863. The District Court granted the defendants' motion and dismissed the complaint solely on the ground of the plaintiffs' failure to exhaust their administrative remedies, and the correctness of that ruling was the only question thoroughly covered in the arguments on appeal.

The plaintiffs-appellants argued that the general rule requiring exhaustion of administrative remedies before resort to the courts of equity was inapplicable for a variety of reasons. And they also argued, citing *Work* v. *Louisiana*, 269 U.S. 250 (1925), that even if the general rule did apply, nevertheless their case fell within the recognized exception to it which permits resort to the courts in spite of failure to exhaust available administrative remedies when it is made to appear that public officials are acting in violation of their clearly defined statutory duties. The defendants conceded the above exception to the usual rule requiring exhaustion of administrative remedies, which they said in their brief quoting *Breimer* v. *Wallin*, 79 F. Supp. 506, 507, 508 (E.D. Pa. 1947) could be stated as follows: "Where a statute, which commands an official of the government to perform, or prohibits him from performing, an act in a particular situation is so clear as to be free from doubt as to what it prescribes, a court will enjoin a violation of the Act even though the victim has not pursued his administrative remedies." But they said

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the exception was inapplicable because it was not entirely clear that the sweeping preference given to veterans in the Act of 1912 had not been superseded, or at least limited to some extent, by § 14 of the Veterans' Preference Act of 1944 which permits veterans to be demoted "for such cause as will promote the efficiency of the service."

In the interval between the argument of the *Wettre* case in this court and our decision, the Supreme Court decided *Hilton* v. *Sullivan*, 334 U.S. 323 (1948) wherein it held (page 336) that the Veterans' Preference Act of 1944 did not supersede or narrow, but if anything broadened, the scope of the preference given to veterans in § 4 of the Act of 1912 quoted above. We thought this holding amounted to a definitive determination that the plaintiffs had an absolute right to be retained in rank, which we thought brought the case within the exception noted above to the general rule requiring exhaustion of administrative remedies as a prelude to resort to the courts. Wherefore on the authority of *Order of Railway Conductors of America* v. *Pitney*, 325 U.S. 561, 566 (1946), wherein the conceded exception to the general rule on which the plaintiffs relied was recognized (see also *Work* v. *Louisiana*, *supra*, and *Miguel* v. *McCarl*, 291 U.S. 442 (1934)), we vacated the District Court's judgment dismissing the plaintiffs' complaint on the ground of failure to exhaust administrative remedies and remanded the case for further proceedings consistent with our opinion, our intention being for that court then to rule on the other grounds advanced by the defendants in support of their motion to dismiss for lack of jurisdiction, and also any other jurisdictional matter such as the existence of an adequate remedy at law or an amount in controversy sufficient to support federal jurisdiction. See the second opinion of this court in the same case *sub nom. Joy* v. *Hague*, 175 F.2d 395 (1949), *cert. denied*, 338 U.S. 870 (1949).

Perhaps in the *Wettre* case I did not express the views

of this court as clearly and in as much detail as I should. However, the decision in that case was meant to be limited to the situation presented, that is to say, to cases in which plaintiffs are able to show a clear violation of some incontestable right under a federal statute and thus bring themselves within what we thought to be an established exception to the general rule requiring exhaustion of administrative remedies. We certainly did not intend in that case to consider, let alone to decide, any jurisdictional question other than the one before us. Those questions are numerous and difficult, see for illustration *Marshall* v. *Crotty*, 185 F.2d 622 (C.A. 1, 1950), and the appropriate time to consider them is when they have been not only considered but definitely ruled upon below and fully briefed and argued on appeal. We indicate no opinion on these questions now. Nor by holding in the *Wettre* case that the plaintiffs were within a recognized exception to the general rule requiring exhaustion of administrative remedies because they had succeeded in showing an obvious violation of their clear rights under § 4 of the Act of 1912 as construed by the Supreme Court in the *Hilton* case, did we intend to indicate that as a general proposition plaintiffs in cases such as this did not need to exhaust their administrative remedies even in the absence of such a showing. On the contrary, we saw no good reason then and we see none now why the general doctrine of exhaustion of available administrative remedies, including of course its exceptions, should not apply in cases such as this with as broad scope and as much force as in other cases, and we so hold in accordance with *Johnson* v. *Nelson*, 180 F.2d 386 (C.A. D.C. 1950), *cert. denied*, 339 U.S. 957 (1950) and *Green* v. *Baughman*, 214 F.2d 878 (C.A. D.C. 1954).

Thus, since the plaintiff herein certainly has not shown, particularly in view of the repeal in 1950 (64 Stat. 1100) of § 4 of the Act of 1912, that his separation is in violation of a clear statutory right to be retained, that is to say,

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that the Regulation of the Civil Service Commission under which he was ordered separated is patently at variance with the clear provisions of § 12 of the Veterans' Preference Act of 1944, he must exhaust the administrative remedies given him by § 14 of that Act before seeking equitable relief against anyone in any court.

The judgment of the District Court dismissing the complaint on the merits is set aside and the case is remanded to that court for the entry of a judgment dismissing the plaintiff's complaint for lack of equity jurisdiction.

MAGRUDER, *Chief Judge* (concurring). I concur in the opinion and judgment of the court. In addition, I should like to suggest another ground for concluding that the district court lacked jurisdiction of the complaint, namely, that the suit in effect was one against the United States, and the United States has not consented to be sued in this manner. I recognize that I may be mistaken about this, since the contrary seems to have been assumed (without notation of the point, however) in cases like *Hilton* v. *Sullivan*, 334 U.S. 323 (1948), and *Elder* v. *Brannan*, 341 U.S. 277 (1951). But since the object sought by the injunctive relief prayed for is the retention of the plaintiff on the federal pay roll, with the consequent obligation upon the United States, I assume, to continue paying for his services, it seems difficult to avoid the conclusion that the present suit is in substance one against the United States.

Suppose the plaintiff had obtained his injunction in the present litigation, and had continued working at the Boston Naval Shipyard. And suppose, upon the government's refusal to pay him his salary, he brought suit against the United States in the Court of Claims. Would the plaintiff expect to have to litigate *de novo* in the Court of Claims the issue as to his right under the Veterans' Preference Act? If so, then what would the plaintiff have gained in

the present injunction suit except the right to work for nothing? Or would the Court of Claims have to hold that the United States was under an inescapable obligation to pay for the services actually rendered by the plaintiff, albeit services forced upon the United States as a result of the injunction forbidding the Commander of the Naval Shipyard from discharging plaintiff?

These considerations suggest to me that what the Supreme Court said in *Lynch* v. *United States*, 292 U.S. 571 (1934), is applicable to the case at bar. The Court in that case said (at 582): "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock*, 250 U.S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States*, 270 U.S. 568, 576." When one considers the practical problems of administration, it is apparent why the Congress did not provide in the Veterans' Preference Act for judicial enforcement of the rights conferred.* Administration of the Act is confided to the Civil Service Commission, which is empowered to issue appropriate regulations. If, due to budgetary limitations, curtailment of force is necessary, and the proper department head or other official prepares to put into effect a schedule of lay-offs in accordance with regulations of the Civil Service Commission, the program

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* By the Act of June 10, 1948, Congress did provide that an employee having rights under §14 of the Veterans' Preference Act of 1944, who is discharged, and after an administrative appeal to the Civil Service Commission is restored to duty on the ground that the discharge was unjustified or unwarranted, shall be paid back pay, at the rate of compensation received on the date of discharge, for the period during which the discharge was in effect, less any amounts earned by him in other employment during that period. It was recognized by the Court of Claims in *O'Brien* v. *United States*, 124 Ct.Cls. 655 (1953), that a discharged employee who has been so reinstated may sue in the Court of Claims to enforce this statutory right to back pay.

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of curtailment would be thwarted if it could be held up by injunction in court proceedings instituted by anyone threatened with lay-off or discharge.

On the same day, March 22, 1955, the following judgment was entered:

JUDGMENT
March 22, 1955.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court dismissing the complaint on the merits is set aside and the case is remanded to that Court for the entry of a judgment dismissing the plaintiff's complaint for lack of equity jurisdiction.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Thereafter, on April 6, 1955, appellant filed a motion for enlargement of time within which to prepare and file a petition for rehearing, which motion was denied by Order of Court that same day.

On said April 6, 1955, the following order was entered:

ORDER OF COURT
April 6, 1955.

Upon motion of appellant to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by

April 26, 1955, and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed until further order of this Court.

By the Court:
ROGER A. STINCHFIELD
Clerk.

CLERK'S CERTIFICATE

I, Roger A. Stinchfield, Clerk of the United States Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1-91, inclusive, contain and are a true copy of the record appendices and proceedings to and including April 7, 1955, in the cause in said Court numbered and entitled, 4899, William J. Fitzpatrick, plaintiff, appellant, versus Philip W. Snyder, Commander, Boston Naval Shipyard, et al., defendants, appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Court of Appeals for the First Circuit at Boston, Massachusetts, in said First Circuit, this eighth day of April, A. D. 1955.

/s/ ROGER A. STINCHFIELD
Clerk.

(SEAL)